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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GILBERT RIOS, Defendant and Appellant.	D074698 (Super. Ct. No. BAF1600486)

APPEAL from a judgment of the Superior Court of Riverside County, Jeffrey J. Prevost, Judge. Reversed and remanded with directions.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald E. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith White, Tami Hennick, and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Gilbert Rios of arson of an inhabited structure (Pen. Code, § 451, subd. (b))[1] and arson of property (§ 451, subd. (d)). In bifurcated proceedings, the trial court found that Rios had been convicted of two prior serious felonies that were also "strike" priors for purposes of the "Three Strikes" law. (§ 667, subds. (a), (c).) It also found that Rios had suffered two prior prison terms and had not remained free of custody or subsequent offense for a five-year period thereafter. (§ 667.5, subd. (b).)

The trial court sentenced Rios to a total term of 36 years to life in prison, consisting of 25 years to life for Rios's conviction for arson of an inhabited structure (§ 667, subd. (e)(2)(A)(ii)), 10 years for Rios's two prior serious felony convictions, and one year for one of Rios's two prior prison terms. It imposed and stayed a 25-years-to-life sentence for Rios's conviction for arson of property under section 654, and it imposed and stayed a one-year term for his second prior prison term.

Rios appeals. He contends (1) the evidence does not support his conviction for arson of an inhabited structure, (2) the court's jury instructions for that offense misstate the law, (3) the evidence does not support the court's finding that he had not been free of custody or subsequent offense for a five-year period after his two prior prison terms, (4) the matter should be remanded to determine his eligibility for mental health diversion under newly-enacted section 1001.36, and (5) the matter should be remanded for the trial court to determine whether to exercise its newly-enacted discretion to strike the five-year serious felony enhancements.

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1 Further statutory references are to the Penal Code unless otherwise specified.

We conclude Rios's contentions have merit, in part. The evidence does not support the trial court's findings regarding his two prior prison terms, and the two newly-enacted statutes on mental health diversion and prior serious felony enhancements are retroactive and applicable in this matter. We therefore reverse the judgment with directions to determine whether to grant mental health diversion under section 1001.36. If the trial court grants diversion, it shall proceed under that statute. If the trial court does not grant diversion, the court shall conduct a new trial on the prior prison term allegations (if the People so elect). Following the new trial, or the expiration of the time to retry the allegations, the trial court shall resentence Rios on his convictions and the court's prior findings that are unaffected by this opinion, as well as any new findings based on the potential retrial of the prior prison term allegations. As part of the resentencing, the court should consider whether to exercise its newly-enacted discretion to strike Rios's prior serious felony conviction enhancements.

FACTS

For purposes of this section, we state the evidence in the light most favorable to the judgment. (See *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.) Additional facts will be discussed where relevant in the following section.

Rios lived with several family members in a house in Banning, California. In 2007, Rios's mother died and left the house to Rios's sister. Rios and his other siblings received only $20 from their mother's estate. Several years later, Rios's sister decided to sell the house. She told Rios he would have to find another place to live and offered to

help him purchase a trailer. Rios's sister eventually found a buyer for the house, and she told Rios he needed to leave.

On April 12, 2016, Rios's sister went to the house to pick up a few of her things. Rios was the only person still living there. He was angry about having to move out. Rios's sister tried to talk to him, but he only yelled at her. He said, "I'm alive and I'm not leaving." His sister left without her things "[b]ecause I knew when he was in that mood, I couldn't deal with him."

That afternoon, Rios set fire to a stack of his sister's possessions in the carport of the house near the wall. He used cardboard and a wooden door to feed the fire. Neighbors saw clouds of smoke and flames almost up to the ceiling of the carport. Rios was standing in the driveway with a water hose. He was spraying the concrete driveway, not the fire. A neighbor yelled at him to put out the fire. Rios briefly sprayed the fire but then turned back to the driveway. He was muttering to himself. At some point he said, "If they're going to start this, I'm going to finish it." He also said, "She can't do this while one of us is alive." Another neighbor grabbed the hose and directed it at the fire.

Police responded and put out the fire. In response to their questions, Rios initially claimed that his sister had set the fire. But then he admitted he had. An officer said, "You almost got the whole house on fire." Rios said, "Yeah. I messed up." Later, an officer asked, "Why would you wanna burn the house down, though?" Rios responded, "Would turn to ashes." Rios explained that he "[p]ut a match to the cardboard" and wanted the "whole house" to burn down.

Firefighters arrived and began an investigation. They noticed charring on the beams supporting the roof and damage to vinyl siding on the outside wall of the house. The house itself was filled with smoke. Firefighters saw furniture inside the house; it looked like someone was living there.

Later that day, a fire investigator questioned Rios further. Rios explained that his sister was trying to get the house. He said, "I did nothing wrong. You know, just start a fire so she'd move out. I did nothing wrong." But later the investigator asked, "Did you want to burn the house?" Rios responded, "Yes. I wanted, you know, I still lived there, that was part of the deal. If I couldn't live there she couldn't live there too." The investigator asked why he set the fire outside the house, rather than on the inside. Rios said, "I didn't think about it. She'd get more money either way." Then he said he hoped his sister thought the fire was an accident, and it seemed more likely to be seen as an accident if the fire were outside.

During the interview, Rios noticed there was a camera in the interview room. He immediately said, "I didn't do nothing, man. [¶] . . . [¶] All I did was try to do was keep my property where I lived." He said he lived in the house and "[a]ll my stuff was there." He said, "I cooked there, I ate there and everything." He exclaimed, "God, I don't even know what I've done," and "I was mad." He said he was only burning his own property and did not intend to burn the house.

At trial, the investigator testified about the scene of the fire and his interview with Rios. He opined that the fire was intentionally set and that it was arson.

DISCUSSION

I

Sufficiency of the Evidence: Inhabited Structure

Rios contends the evidence does not support his conviction for arson of an inhabited structure. "Our task is clear. 'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Cravens* (2012) 53 Cal.4th 500, 507.)

"In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).)

Rios argues the evidence was insufficient to support the jury's implicit finding that his house was an "inhabited structure" within the meaning of the arson statute. (§ 451,

subd. (b).) " 'Inhabited' means currently being used for dwelling purposes whether occupied or not." (§ 450, subd. (d).) It is not enough that "the purpose of the structure is to serve as a dwelling." (*People v. Jones* (1988) 199 Cal.App.3d 543, 546 (*Jones*).) The evidence must show that "someone had the present intent to use the house as a dwelling at the time of the fire." (*Id.* at p. 549.) The statute "requires current inhabitation, i.e., that the structure be inhabited at the present time. The present for purposes of arson is the time the fire is set." (*People v. Vang* (2016) 1 Cal.App.5th 377, 386 (*Vang*).) The statute reflects the intent of the Legislature to punish more severely a category of arson that involves a higher risk of danger to human life, since inhabited structures are more likely to be occupied by humans than other structures. (*People v. Green* (1983) 146 Cal.App.3d 369, 379.)

Viewing the record in the light most favorable to the verdict, as we must, we conclude the evidence supports the jury's verdict. The evidence showed that Rios lived in the house at the time of the fire. Rios's sister testified he was living there. Rios's furniture was still in the house, and he repeatedly claimed the house as his home. The jury could reasonably find that Rios was using the house for "dwelling purposes" at the time of the fire. Indeed, Rios's counsel conceded this element during closing arguments. He stated, "Inhabited structure. What does that mean . . . ? That someone was living at the house. That someone was living at the house. You have enough evidence that my client was still living at the house; okay? No issues there."

In his appellate briefing, Rios argues he could not have intended to use the house as a dwelling at the time of the fire because he deliberately set fire to it. He relies heavily

on *Jones, supra,* 199 Cal.App.3d 543. The defendant in *Jones* was evicted from a house he rented, along with several other tenants. (*Id*. at p. 545.) The day after the eviction, the defendant was seen entering and leaving the house several times. (*Ibid*.) Later the same day, he set fire to the house. (*Ibid*.) The defendant was convicted of arson of an inhabited structure. (*Id*. at p. 544.) On appeal, he argued the evidence was insufficient to support the jury's finding that the house was inhabited. (*Id*. at p. 549.) The reviewing court agreed. The only evidence of habitation concerned the former tenants, and the evidence did "not support a finding any of the tenants intended to continue using the house as a dwelling place." (*Ibid*.) For example, "[t]here was no evidence anyone slept in the house after the eviction." (*Ibid*.) In the alternative, the court reasoned, "[e]ven if defendant did spend the night in the house, setting fire to a house contravenes an intent to use it for dwelling purposes." (*Ibid*.)

Rios claims that *Jones* stands for the general proposition that a defendant cannot, as a matter of law, set fire to a house and also have the present intent to use it for dwelling purposes. We disagree that *Jones* should be read so broadly.

Arson of an inhabited structure is a general intent crime. (*People v. Atkins* (2001) 25 Cal.4th 76, 84 (*Atkins*).) It requires that the act constituting arson be done " 'willfully' and 'maliciously' " but does not require any particular intent concerning the structure itself. (*Id*. at pp. 85-86.) " '[T]he terms "willful" or "willfully," when applied in a penal statute, require only that the illegal act or omission occur "intentionally," without regard to motive or ignorance of the act's prohibited character.' " (*Id*. at p. 85.) "Maliciously" is defined by statute as "a wish to vex, defraud, annoy, or injure another person, or an intent

to do a wrongful act, established either by proof or presumption of law." (§ 450, subd. (e); see *Atkins*, at p. 85.) "[M]alice will be presumed or implied from the deliberate and intentional ignition or act of setting a fire without a legal justification, excuse, or claim of right." (*In re V.V.* (2011) 51 Cal.4th 1020, 1028; accord, *Atkins*, at pp. 88-89.)

A defendant may therefore act with any number of specific intents, or no specific intent at all, and be convicted of arson of an inhabited structure. For example, a defendant may commit arson out of anger or spite, for attention, to annoy another person, or merely because he wanted to see something burn. Any of these intents may, under appropriate factual circumstances, be consistent with a present intent to use the house as a dwelling purpose. And, in any event, a defendant's actions and intents need not be fully consistent for him to be convicted of a crime.

Arson, in particular, does not always lend itself to a sophisticated parsing of intents. "In arson . . . there is generally no complex mental state, but only relatively simple impulsive behavior. A typical arson is almost never the product of pyromania [citations]. Instead, 'it often is an angry impulsive act, requiring no tools other than a match or lighter, and possibly a container of gasoline.' [Citation.] 'Arson is one of the easiest crimes to commit on the spur of the moment . . . it takes only seconds to light a match to a pile of clothes or a curtain.' " (*Atkins*, *supra*, 25 Cal.4th at pp. 91-92.) Revenge and vindictiveness are the principle motives for arson. (*Id*. at p. 92.)

Under some circumstances, like *Jones*, the act of setting fire to a structure may confirm that the defendant has made the decision to abandon the structure and no longer use it for dwelling purposes. But under other circumstances, a rational jury could find

that the defendant had not abandoned the structure. His act of burning it may coexist with an intent to use it for dwelling purposes. The defendant need not have ever considered any relationship between the two.

Here, Rios gave a number of conflicting explanations for setting the fire. He said he was angry with his sister, he wanted her to move out, he wanted to prevent anyone else from living there, he wanted to "keep [his] property where [he] lived," he "[didn't] even know what [he'd] done," he "messed up," he did not intend to burn the house, and he wanted to burn the whole house down. Given these conflicting explanations, and the undisputed evidence that Rios was living at the house at the time of the fire, the jury could reasonably find that Rios had not made the decision to abandon the house. He retained the present intent to use the house as a dwelling even as he set the fire. As one court observed in the analogous context of burglary, "A formerly inhabited dwelling becomes uninhabited *only* when its occupants have moved out permanently and do not intend to return to continue or to resume using the structure as a dwelling." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 320, italics added.) Rios had not moved out at the time of the fire, and the jury could reasonably conclude he did not intend to do so. The evidence supports the jury's verdict.[2]

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2 Rios points out that the prosecutor, in closing arguments, referred to Rios's statements about burning down the whole house. But "[i]t is elementary . . . that the prosecutor's argument is not evidence and the theories suggested are not the exclusive theories that may be considered by the jury." (*People v. Perez* (1992) 2 Cal.4th 1117, 1126; accord, *People v. Clark* (2011) 52 Cal.4th 856, 947.) We may only reverse for insufficient evidence if there is *no* theory under which the evidence would support the verdict. (*Zamudio, supra*, 43 Cal.4th at p. 357.)

II

Instructional Error

In a related argument, Rios contends the trial court's jury instructions misstated the law. The court gave the form instruction on arson of an inhabited structure, CALCRIM No. 1502, which included the following statement: "A structure is inhabited if someone lives there and either is present or has left but intends to return." The court also gave a pinpoint instruction requested by the prosecution: "You may conclude that the structure was inhabited if, at the time of the incident at issue, the People have proven someone had the present intent to inhabit the structure. You may not consider whether that individual had the legal or possessory right under the law to be present on the property that he or she intended to use as a dwelling. 'Someone' includes any person, including the defendant. The fact that a tenant has no possessory right to the premises is of no consequence to the crime of arson."

" 'In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instructions in a manner that violated the defendant's rights.' [Citation.] We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction." (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.) " 'Errors in jury instructions are questions of law, which we review de novo.' " (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 642.)

Viewed as a whole, the court's instructions adequately convey the legal principles relevant to the jury's determination whether the house was inhabited at the time of the fire. By using the present tense term "lives," the instructions told the jury that the structure had to be inhabited at the time of the fire. (See *Vang*, *supra*, 1 Cal.App.5th at p. 386.) The pinpoint instruction reiterated that requirement. It told the jury that a person had to have the "present intent" to inhabit the structure at the time of the fire in order for the structure to be inhabited. (See *Jones*, *supra*, 199 Cal.App.3d at p. 549.)

Rios argues that the instructions misstate the law because they do not require a finding that he intended to live in the house after he started the fire. He argues that the relevant intent is "*future* intent," i.e., "the intent to live in the structure in the future." We disagree that "*future* intent," as defined by Rios, is a correct statement of the law. As *Jones* states, "In order to meet [their] burden, the People had to show someone had the *present* intent to use the house as a dwelling at the time of the fire." (*Jones*, *supra*, 199 Cal.App.3d at p. 549, italics added.) A present intent, as used in *Jones* and the jury instructions, necessarily involves the defendant's consideration of the future—but it is viewed as of the time of the fire. (See *Vang*, *supra*, 1 Cal.App.5th at p. 386.) Rios claims the instructions "did not convey the notion that the jury had to find beyond a reasonable doubt that [he] had the intent to inhabit the structure in the future, after the fire." But the prosecution was not required to show that Rios intended to live at the house regardless of future events. It had to prove only that Rios intended to live there at

the time he set the fire. As explained above, this intent may coexist with a general intent to commit arson. Rios has not shown the court's jury instructions were erroneous.[3]

III

Sufficiency of the Evidence: Prior Prison Term Enhancements

Rios contends the evidence did not support the trial court's imposition of two prior prison term enhancements under section 667.5, subdivision (b). Rios suffered a felony conviction in April 2000, served time in prison, and was released from custody in May 2002. Rios suffered another felony conviction in July 2004, served time in prison, and was released from custody again in February 2011. The record does not reflect any further offenses or prison terms until Rios committed the instant offenses in April 2016.

The statute provides, in relevant part, as follows: "[T]he court shall impose a one-year term for each prior separate prison term . . . ; provided that no additional term shall be imposed under this subdivision for any prison term . . . prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody . . . ." (§ 667.5, subd. (b).) "Thus, 'if a defendant is free from both prison custody *and* the commission of a new felony for *any*

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3 In addition, to the extent Rios contends the form jury instruction (CALCRIM No. 1502) required clarification or explanation, he has forfeited any such contention by failing to object to that instruction in the trial court. (See *People v. Maury* (2003) 30 Cal.4th 342, 426 [" 'Defendant's contention essentially is that the instructions given needed amplification or explanation; but since he did not request such amplification or explanation, error cannot now be predicated upon the trial court's failure to give them on its own motion.' "].) Rios did object to the pinpoint instruction.

five-year period following discharge from custody or release on parole, the enhancement does not apply.' " (*People v. Buycks* (2018) 5 Cal.5th 857, 889 (*Buycks*).)[4]

"Courts sometimes refer to [this] requirement, which exempts from the enhancement defendants who have not reoffended for five years, as ' " 'washing out.' " ' [Citations.] ' "The phrase is apt because it carries the connotation of a crime-free cleansing period of rehabilitation after a defendant has had the opportunity to reflect upon the error of his or her ways." ' [Citation.] 'According to the "washout" rule, if a defendant is free from both prison custody *and* the commission of a new felony for *any* five-year period following discharge from custody or release on parole, the enhancement does not apply.' " (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 742.)

The prosecution bears the burden of proving that the prior prison term enhancements survive the washout rule. "[F]or the prosecution to prevent application of the 'washout' rule, it must show a defendant *either* served time in prison *or* committed a crime leading to a felony conviction within the pertinent five-year period." (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229 (*Fielder*).)

Rios argues that the prosecution did not present any evidence that he committed an offense or served time in prison during the five-year period from February 2011 through April 2016. In his view, therefore, the evidence was insufficient to support the trial

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4 We note that the statute deems a county jail term imposed under section 1170, subdivision (h) to be generally equivalent to a prison term for purposes of the sentencing enhancement and washout rule. (§ 667.5, subd. (b).) However, following the convention of the prior authorities, we will refer generally to "prison terms" for convenience when discussing the statute. Any distinction is irrelevant to this appeal.

court's findings that he suffered two prior prison terms and had not remained free of custody or subsequent offense for a five-year period thereafter.

The Attorney General concedes that the evidence does not support the court's findings regarding the second prior prison term, but he disputes Rios's view of the first prior prison term. The Attorney General argues that the five-year washout period must directly follow a defendant's release from prison. Here, because Rios reoffended within five years of his release from custody in May 2002, the washout rule would not apply to that prior prison term.

The Attorney General does not support his argument with any reasoned legal analysis. The statute itself does not contain the limitation he suggests. It categorically states, "[N]o additional term shall be imposed under this subdivision for *any* prison term . . . prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody . . . ." (§ 667.5, subd. (b), italics added.) Thus, under the plain language of the statute, "any" prison term that precedes the five-year washout period is not subject to the enhancement. (See *Buycks*, *supra*, 5 Cal.5th at p. 889.)

The authorities cited by the Attorney General, with one exception, do not address the situation here. (See *People v. Tenner* (1993) 6 Cal.4th 559, 563 [washout period not at issue]; *People v. Nobleton* (1995) 38 Cal.App.4th 76, 84-85 [washout period applied to single prior prison term; no other terms alleged]; *People v. Elmore* (1990) 225 Cal.App.3d 953, 960 [no washout period at all]; *People v. Young* (1987)

192 Cal.App.3d 812, 816 [no washout period at all]; *People v. Jackson* (1983) 143 Cal.App.3d 627, 630-631 [no washout period at all].)

The one exception, *Fielder*, contradicts the Attorney General's interpretation of the statute. In *Fielder*, the defendant served one prior prison term, reoffended within five years and served a second prior prison term, but then (after some intervening legal troubles) completed a five-year period with no evidence of another offense or an additional prison term. (*Fielder, supra*, 114 Cal.App.4th at pp. 1233-1234.) The reviewing court held that the washout period applied to both prior prison terms, even though it did not directly follow either. (*Id*. at p. 1234.) Other authorities confirm this interpretation of the statute. (See, e.g., *People v. Kelly* (2018) 28 Cal.App.5th 886, 900, 907 [a single five-year period washes out all previous prior prison terms]; *People v. Warren* (2018) 24 Cal.App.5th 899, 914, 917 [same].)

Here, the prosecution did not present any evidence that Rios did not complete the required five-year washout period from February 2011 through April 2016. The evidence was therefore insufficient to sustain the trial court's finding that the washout period did not apply to Rios's two prior prison terms. We note that, under such circumstances, retrial of these allegations is not barred. (*Fielder, supra*, 114 Cal.App.4th at p. 1234.)

IV

Mental Health Diversion

After Rios was sentenced, the Legislature enacted Assembly Bill No. 1810, which added section 1001.36 to the Penal Code. (Stats. 2018, ch. 34, § 24.) It took effect immediately. (*Id*., § 37.) Section 1001.36 created a pretrial diversion program for certain

defendants who suffer from mental disorders and meet the criteria specified in the statute. (§ 1001.36, subd. (b).) If a defendant meets these criteria, the trial court may postpone criminal proceedings against him to allow the defendant to undergo mental health treatment. (§ 1001.36, subds. (a), (c).) If the defendant performs satisfactorily in diversion, the trial court shall dismiss the criminal charges against him. (§ 1001.36, subd. (e).)

Rios contends this newly-enacted statute applies retroactively to him. (See *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) He points to evidence in the record that he satisfies the criteria for mental health diversion, including that he suffers from a mental disorder, his mental disorder was a significant factor in the commission of the charged offenses, and his mental disorder is treatable. He argues he would be an "excellent candidate" for diversion.

The Attorney General disagrees. He contends that the statute was intended to operate only prospectively and, even if it were retroactive, Rios is not entitled to remand because it would be futile.

A

We first consider the issue of retroactivity. " 'The Legislature ordinarily makes laws that will apply to events that will occur in the future. Accordingly, there is a presumption that laws apply prospectively rather than retroactively. But this presumption against retroactivity is a canon of statutory interpretation rather than a constitutional mandate. [Citation.] Therefore, the Legislature can ordinarily enact laws that apply retroactively, either explicitly or by implication. [Citation.] In order to determine if a

law is meant to apply retroactively, the role of a court is to determine the intent of the Legislature, or in the case of a ballot measure, the intent of the electorate.' " (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307 (*Lara*).)

Under the *Estrada* rule, "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Estrada, supra*, 63 Cal.2d at p. 745.) The rule has been extended to statutory amendments that have the effect of reducing the *potential* punishment for a class of persons, not merely the actual punishment for a particular crime. (*People v. Francis* (1969) 71 Cal.2d 66, 76 (*Francis*); see *Lara, supra*, 4 Cal.5th at pp. 307-308.)

" 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' " (*Lara*, *supra*, 4 Cal.5th at p. 308.)

In a recent opinion, Division Three of this court held that section 1001.36 applied retroactively to cases not yet final on appeal. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*), review granted Dec. 27, 2018, S252220.) *Frahs* relied on the Supreme

Court's recent discussion of the retroactivity of Proposition 57, which enacted certain changes to the handling of juvenile criminal defendants. (*Frahs*, at p. 790, review granted, citing *Lara*, *supra*, 4 Cal.5th 299.) *Frahs* reasoned, "Here, similar to Proposition 57, the mental health diversion program under section 1001.36 does not lessen the punishment for a particular crime. However, for a defendant with a diagnosed mental disorder, it is unquestionably an 'ameliorating benefit' to have the opportunity for diversion—and ultimately a possible dismissal—under section 1001.36. . . . [¶] Applying the reasoning of the Supreme Court, we infer that the Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion to 'apply to every case to which it constitutionally could apply.' " (*Frahs*, at p. 791, review granted.)

The Attorney General contends *Frahs* was wrongly decided. He first points out that the statute by its terms enacted only a *pretrial* diversion program that is available "at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).) He argues that this language shows the Legislature intended the statute to apply only where criminal proceedings had not yet resulted in a conviction, which would exclude defendants like Rios who were convicted before the effective date of the statute. But, as *Frahs* explained, "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose

convictions are not yet final on appeal." (*Frahs, supra*, 27 Cal.App.5th at p. 791, review granted.)

We note additionally that the Attorney General's argument runs counter to other accepted applications of the *Estrada* rule. For example, two new statutes that confer discretion on a trial court to strike firearm enhancements "at the time of sentencing" have, by their own terms, no application after sentencing has occurred. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) But numerous courts have found that these statutes have retroactive application. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56 [collecting cases].) The Legislature's description of when an ameliorative change occurs procedurally (e.g., pretrial, during trial, at sentencing) does not necessarily indicate a legislative intent that such a change is not retroactive.

The Attorney General also relies on certain legislative history materials that refer to potential cost savings as a motivating factor for the enactment of section 1001.36. The materials predict that certain defendants who would otherwise be referred to state mental hospitals because they were incompetent to stand trial would enter the lower-cost mental health diversion program. (See Assem. Floor Analysis of Assem. Bill No. 1810 (2017-2018 Reg. Sess.) June 12, 2018, item 17.) The Attorney General argues that this focus on cost savings is inconsistent with an intent to apply the statute retroactively, since retroactive application would increase costs.

The Attorney General's argument overlooks a more persuasive statement of legislative intent: the section of the statute that expressly recites the purpose of the mental health diversion program. Section 1001.35 states, "The purpose of this chapter is

to promote all of the following: [¶] (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. [¶] (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. [¶] (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." Retroactive application of section 1001.36 would promote at least the first and third purposes. Cost savings are not mentioned. We therefore cannot say sufficient "contrary indications" exist that would prevent normal application of the rule that the Legislature intends ameliorative changes to extend as broadly as possible. (See *Lara*, *supra*, 4 Cal.5th at p. 308.)

For the foregoing reasons, we agree with *Frahs*. Section 1001.36 applies retroactively to defendants, like Rios, whose cases are not yet final on appeal. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, review granted.)

B

The Attorney General further contends, even if section 1001.36 is retroactive, Rios has not made a sufficient showing that he would be entitled to the benefit of the statute and any remand would be futile. The Attorney General notes that section 1001.36 requires a defendant to satisfy six criteria before a trial court may order pretrial diversion. These criteria are summarized as follows: (1) the defendant must suffer from a qualifying mental disorder; (2) the mental disorder must have been a significant factor in the commission of the charged offense; (3) in the opinion of a qualified medical expert,

the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment; (4) the defendant consents to diversion and waives his or her right to a speedy trial; (5) the defendant agrees to comply with treatment as a condition of diversion; and (6) the defendant will not pose an unreasonable risk of danger to public safety, defined as an unreasonable risk that the petitioner will commit a new violent felony specified by statute, if treated in the community. (§§ 1001.36, subd. (b)(1)(A)-(F), 1170.18, subd. (c).)

The Attorney General appears to accept that Rios has made a threshold showing of three of the criteria: He has been diagnosed with a qualifying mental disorder, the disorder was a significant factor in the charged offense, and his symptoms would respond to treatment. The Attorney General argues, however, that Rios has not shown he would agree to treatment (because he has been noncompliant in the past) or that he would not be an unreasonable risk to public safety. The Attorney General points to the trial court's comments at sentencing, in denying Rios's request to dismiss his prior strike under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, that Rios should be incarcerated. The court stated, "[Rios] represents a danger to the community and to his family and that a lengthy period of incarceration is, I think, unfortunately, the only manner in which society's prepared to deal with the type of danger that he represents" and "I think that he does need to be incarcerated for a substantial period of time to protect society." The Attorney General asserts that a remand for diversion consideration would be "futile" because there is no possibility the trial court would exercise its discretion to grant mental health diversion. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 419.)

The showing required by Rios at this stage is not immediately apparent. In *Frahs*, the defendant appeared to meet only one of the requirements (a diagnosed mental disorder), but the court held he had made a sufficient showing on appeal to warrant remand. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, review granted.) A court's decision to grant pretrial diversion appears to be discretionary. (See § 1001.36, subd. (a) ["On an accusatory pleading . . . the court *may* . . . grant pretrial diversion . . . ."], italics added.) But certain threshold requirements must be satisfied, not all of which involve discretion. (See § 1001.36, subd. (b)(1)(A)-(F).)

We need not articulate here a general standard applicable to all situations. Taking the Attorney General's argument on its own terms, we disagree that Rios has not made a sufficient showing of eligibility or that remand in this matter would be futile. As noted, Rios has made threshold showings on three of the six diversion criteria. Two of the remaining criteria require Rios to consent to diversion and agree to comply with treatment. Since those requirements involve decisions *by Rios*, we may accept his pursuit of diversion in this appeal as an indication that he would consent to diversion and agree to treatment. Past noncompliance with treatment does not foreclose the reasonable probability that Rios would agree to attempt treatment again in diversion.

The final criterion requires the trial court to be "satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community." (§ 1001.36, subd. (b)(1)(F).) As noted, in this context, this requirement means that the defendant cannot pose an unreasonable risk that he or she will commit a new violent felony specified by statute. (*Ibid*.; see § 1170.18, subd. (c); see

also § 667, subd. (e)(2)(C)(iv).) "These violent felonies are known as 'super strikes' and include murder, attempted murder, solicitation to commit murder, assault with a machine gun on a police officer, possession of a weapon of mass destruction, and any serious or violent felony punishable by death or life imprisonment." (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 242.)

While the trial court concluded that Rios's period of incarceration should not be reduced by dismissing his prior strike, that conclusion requires a different analysis than a court's consideration of mental health diversion. Mental health diversion does not simply allow a defendant to avoid incarceration; it requires him or her to receive treatment designed to alleviate the symptoms of his or her mental disorder. The trial court here had no opportunity to consider whether Rios's risk of dangerousness would be mitigated by treatment or whether he would meet the high standard of dangerousness in this statute (an unreasonable risk that he would commit a "super strike" felony) while undergoing treatment. We note that none of Rios's current or past convictions is listed as a "super strike" under the statute. (See § 667, subd. (e)(2)(C)(iv).)

Under these circumstances, we cannot say the trial court's comments clearly indicated that it would not order mental health diversion if it had been aware it was an option. Remand for consideration of that issue would not be futile. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425, 428.) Even if we were to employ a higher standard, that Rios must show it was reasonably probable that he would be granted diversion (see, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 355), we would conclude Rios had made a sufficient showing for the reasons we have already discussed. He has made a

showing that he satisfies three of the six criteria, and two of the others are within his control. And, given the high standard for a finding of dangerousness, Rios's history (including his lack of "super strike" convictions) shows he could potentially satisfy that criterion too.

We therefore reverse the judgment with directions for the trial court to consider diverting Rios under section 1001.36. (*Frahs*, *supra*, 27 Cal.App.5th at p. 792, review granted.) We express no opinion on the merits of that determination or any criterion thereunder.

V

Prior Serious Felony Enhancements

The Legislature enacted another statute after Rios was sentenced, Senate Bill No. 1393, which removed the statutory prohibition on striking the five-year prior serious felony enhancement under sections 667, subdivision (a) and 1385. (Stats. 2018, ch. 1013, §§ 1-2.) It became effective on January 1, 2019. (See Cal. Const., art. IV, § 8, subd. (c), par. (1); Gov. Code, § 9600, subd. (a).)

Rios contends this statute, as well, should be applied retroactively under *Estrada*, as Division Two of this court recently held. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971-972.) The Attorney General concedes the issue. (See *Francis*, *supra*, 71 Cal.2d at pp. 75-76.) We agree with *Garcia* and accept this concession. If the trial court does not order diversion under section 1001.36, it will need to resentence Rios, which would include consideration of its newly-enacted discretion to strike his prior serious felony enhancements.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to hold a hearing under section 1001.36 to determine whether to grant diversion under that statute.

If the trial court grants diversion, it shall proceed in accordance with that statute. If Rios performs satisfactorily in diversion, the court shall dismiss the charges. (§ 1001.36, subd. (e).)

If the trial court does not grant diversion, or it grants diversion but Rios does not satisfactorily complete diversion (§ 1001.36, subd. (d)), then the court shall reinstate his convictions, conduct a new trial on the prior prison term enhancement allegations (if the People so elect), and resentence Rios consistent with this opinion.

GUERRERO, J.

I CONCUR:

McCONNELL, P. J.

I CONCUR IN THE RESULT:

HUFFMAN, J.